

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DARRYL HORTON,)
Appellant,) Case No. DISM-98-0036
v.) FINDINGS OF FACT, CONCLUSIONS OF LAW
DEPARTMENT OF SOCIAL AND HEALTH) AND ORDER OF THE BOARD
SERVICES,)
Respondent.)

I. INTRODUCTION

1.1 Hearing. This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; NATHAN S. FORD JR., Vice Chair; and GERALD L. MORGEN, Member. The hearing was held on May 26 and June 10, 1999, in the Personnel Appeals Board hearing room in Olympia, Washington.

1.2 Appearances. Appellant Darryl Horton was present and was represented by Edward E. Younglove III, Attorney at Law, Parr and Younglove, P.L.L.C. Respondent Department of Social and Health Services was represented by Neil R. Martinson, Assistant Attorney General.

1.3 Nature of Appeal. This is an appeal from the disciplinary sanction of dismissal for neglect of duty, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleges that Appellant failed to follow policies and written guidelines while he supervised two clients under his care and that he physically assaulted the clients.

1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School

1 for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-
2 053 (1994).

3 4 **II. MOTIONS**

5 2.1 On May 24, 1999, the Board heard oral argument on Respondent' Motion to Quash Subpoena
6 Duces Tecum for Renetta Marlow.

7
8 2.2 Respondent provided responses to Appellant's interrogatories and requests for production. In
9 the responses, Respondent objected to the release of information regarding the two clients involved in
10 the incident for which Appellant was disciplined. Respondent stated that the information was exempt
11 from disclosure under RCW 42.17.310(a).

12
13 2.3 Following the discovery cutoff date of April 26, 1999, Appellant served a Subpoena Duces
14 Tecum to Renetta Marlow. The subpoena instructed Ms. Marlow to appear at the hearing to give
15 evidence and to bring with her the disciplinary letter for James Airey and the agency's records regarding
16 clients Gordon L. and Richard W. for the period of October 1, 1992 through October 1, 1997.
17 Respondent objected to the subpoena and sought an order to quash from the Board.

18
19 2.4 Respondent argued that Appellant failed to follow the discovery provisions of WAC 358-30-150
20 and was attempting to circumvent the discovery process. Respondent asserted that the subpoena should
21 be quashed because the department could not release client records without a lawful order of a court or
22 the informed consent of the clients. In addition, Respondent asserted that the records regarding the
23 clients were immaterial to Appellant's misconduct.

24
25 2.5 Appellant argued that he was not compelling production of records for discovery purposes but
26 was seeking to compel production of evidence at the hearing. Appellant argued that he worked with the

1 clients' records and files and was familiar with the contents of the records. Appellant asserted he was
2 seeking to having the records present at the hearing as evidence for the purpose of proving the content
3 of the records. Appellant argued that pursuant to WAC 358-30-120(5) and CR 45(b), he is entitled to
4 subpoena relevant evidence to his hearing. Appellant further argued that if he was not allowed to
5 subpoena the clients' records, Respondent should be precluded from presenting evidence related to the
6 records. Appellant asserted that fundamental fairness and due process required that either Appellant
7 have access to the same information as the department relevant to the clients, or that the department not
8 be permitted to use the information.

9
10 2.6 The Board considered the arguments of the parties and issued an oral ruling denying the motion.
11 We now confirm that ruling. Regard Mr. Airey's disciplinary letter, the Board should not be put in the
12 position of deciding in advance what testimony or evidence an attorney wishes to present at the hearing.
13 If the testimony or evidence is brought forward during the hearing, opposing counsel may object and the
14 Board will make a determination at that time. Regard the client records, the subpoena duces tecum
15 which requires Ms. Marlow to bring records to the hearing would not necessarily result in an
16 unauthorized release of confidential health care information or mental illness and treatment records.

17
18 2.7 The parties to proceedings before the Board should attempt to resolve concerns related to
19 discovery issues before seeking to quash information. For example, the parties could enter into an
20 appropriate protective order prohibiting the release of confidential information. In this case, Respondent
21 opened the door to inquiry into client information by releasing the clients' names and releasing
22 information related to the treatment of clients' injuries. However, we concluded that complying with
23 the subpoena to bring records to the hearing did not necessarily lead to an unauthorized release of
24 confidential information.

25 26 **III. FINDINGS OF FACT**

1 3.1 Appellant Darryl Horton was an Attendant Counselor (AC) 2 and a permanent employee of
2 Respondent Department of Social and Health Services (DSHS) with the Division of Development
3 Disabilities, Region 5, State Operated Living Alternatives (SOLA) program. Appellant and Respondent
4 are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358
5 WAC. Appellant filed a timely appeal of his dismissal on July 6, 1998.

6
7 3.2 Appellant began employment with DSHS in December 1987 as a temporary employee. He
8 accepted a permanent position in April 1989. In August 1990, he began working for the SOLA
9 program. Appellant had no previous disciplinary actions and for the most part, his performance
10 evaluations rated him as meeting or exceeding normal requirements for his position.

11
12 3.3 At the time of the incident giving rise to this appeal, Appellant worked primarily with two
13 SOLA clients, Gordon L. and Richard W. Appellant's duties included driving the clients from their
14 home to appointments, work and shopping and accompanying them while they were shopping. On
15 August 13, 1997, one of Appellant's responsibilities was to pick up Gordon and Richard from their
16 work at Center Force and take them home.

17
18 3.4 Appellant used a state owned vehicle to transport Richard and Gordon. The vehicle was an
19 older model sedan and the air conditioning did not work.

20
21 3.5 Richard has autism, is non verbal, is known to be physically aggressive, does not reliably follow
22 instructions and has no community safety skills. Gordon has sexual deviancy issues and has specific
23 guidelines outlining the intense support staff are to provide for him.

24
25 3.6 On June 21, 1997, Appellant confirmed that he understood the guidelines for Gordon. The
26 guidelines state, in relevant part:

1

2 1. Gordon must be within eyesight and within reach at all times when in the community.
3 Any time Gordon sets foot out his front door he is considered to be in the community.
4 Within reach means not more than an arm's length away from staff.

5

6 Gordon and Richard can not (sic) ride in the same area in a car. One must be in the back
7 seat and one in the front.

8 Gordon and Richard are not to be left alone in the same room.

9 Gordon and Richard are not allowed to touch each other in any way. . . .

10

11 (Ex. R-1-A).

12 3.7 On August 13, 1997, the temperature was hot and Richard was having a difficult day. He
13 became agitated at work and needed to be removed from the work site. Renetta Marlow, Program
14 Manager for Region 5 SOLA program, instructed Appellant to take Richard outside and try to get him to
15 calm down. When the attempts to calm Richard failed, Ms. Marlow asked Appellant to take Richard
16 home.

17
18 3.8 Appellant took Richard home. Richard seemed to calm down so Appellant took him to lunch at
19 Wendy's restaurant.

20
21 3.9 At 2:00 p.m., Appellant needed to return to Center Force to pick up Gordon and take him home.
22 The next shift of staff at Richard and Gordon's home started at 3:00 p.m. Because no staff were at
23 Richard and Gordon's home, Appellant could not leave Richard. Therefore, he took Richard with him
24 to Center Force to pick up Gordon.

1 3.10 After picking up Gordon, Appellant put Richard in the passenger-side back seat of the car and
2 put Gordon in the passenger-side front seat of the car. As Appellant proceeded to drive toward Richard
3 and Gordon's home, Richard became agitated again, began hollering, screaming and reaching forward
4 between the seats. Appellant stopped the car and told Richard and Gordon that he would get them a
5 soda. Appellant thought that a soda would help Richard to cool down and stay in control.

6
7 3.11 Appellant stopped at a 7-Eleven store to purchase sodas. He parked in the front of the store.
8 Appellant left Richard and Gordon alone in the car while he entered the store to purchase sodas. There
9 were windows across the front of the store and Appellant felt that he could keep Richard and Gordon in
10 sight from the inside of the store.

11
12 3.12 The testimony concerning Appellant's behavior during the events from this point forward are in
13 dispute. The owner and two employees of the 7-Eleven store each reported what they believed had
14 occurred. However, the three written statements are inconsistent and are inconsistent with the events
15 recorded by the store's security camera and the actions observed by a police detective and a paramedic.
16 Therefore, we do not find their retelling of the events credible. Based on the credible testimony and our
17 viewing of the security camera video tape, we find that the following events occurred.

18
19 3.13 Appellant entered the store and walked to the back of the store to get sodas. Appellant saw
20 Richard climb out of the window of car. Richard opened the front door of the store. Appellant
21 proceeded to the front of the store, took Richard by the arm and guided him back to car. After
22 Appellant got Richard back into the car, Appellant returned to the store.

23
24 3.14 While Appellant was waiting to purchase the sodas, he saw Gordon's arm pulled back between
25 the seats. Richard was biting Gordon's arm. Appellant went back to the car. He grabbed and held one
26 of Richard's arms while he tried to get Richard to release his hold on Gordon and stop biting Gordon's

1 arm. Richard did not immediately release Gordon, but when he did, Appellant got both Richard and
2 Gordon out of the car. Appellant held Richard by the arm and took both clients to the side of the store
3 where there was an open area and Richard would have the space he needed to calm down. One of the
4 methods used to calm Richard was to allow him some space in which to physically move and work out
5 his frustration and aggression. This method usually was successful in calming Richard.

6
7 3.15 While Richard was calming down, Appellant lit cigarettes for himself and Gordon.

8
9 3.16 After Richard calmed down, Appellant returned to the store taking Richard and Gordon with
10 him. Appellant continued to have difficulties with Richard and Gordon in the store and decided the best
11 alternative was to take them home. Before leaving the store, Appellant provided the owner with his
12 DSHS identification and before leaving the parking lot, Appellant provided her with the telephone
13 number of his supervisor.

14 3.17 When these events began, the owner of the store called 911 to report what she perceived as
15 Appellant abusing the clients. The owner also reported that the clients were injured.

16
17 3.18 When the 911 call came in, Pierce County Sheriff's Department Detective Bret Farrar was in the
18 area in an unmarked Sheriff's car. He responded to the location of the 7-Eleven and parked across the
19 street to observe what was happening. He observed Appellant attempting to get Richard and Gordon
20 into the car and preparing to leave. Detective Farrar approached Appellant, checked Appellant's
21 identification and asked Appellant what was happening. Detective Farrar could see that both Richard
22 and Gordon were becoming extremely agitated. Detective Farrar allowed Appellant to leave the area.
23 Detective Farrar observed Appellant interacting with Richard and Gordon for approximately four to five
24 minutes and at no time saw Appellant being physically abusive to the clients.

1 3.19 Before Appellant left the parking lot of the 7-Eleven, a paramedic arrived. The paramedic
2 conducted a visible check of Richard and Gordon. The paramedic did not provide medical aid to Richard
3 or Gordon.

4
5 3.20 Appellant left the store and immediately returned Richard and Gordon to their home. After
6 arriving at the home, Appellant asked Jerry Jenkins, AC2 for SOLA, to check the clients for injuries.
7 Mr. Jenkins found that Gordon had bite marks and scratches on his arm. The bite had not broken the
8 skin on Gordon's arm. He found no injuries on Richard. The following morning, Robert Davidson, AC
9 Manager and Appellant's supervisor, checked the clients for injuries. Mr. Davidson found that Gordon
10 has scratches on his arm, but he did not observe a bite mark. Mr. Davidson also found that Richard
11 indicated that his mouth was sore and he was eating slowly. On August 15, 1997, two days after the
12 incident at the 7-Eleven, a Physician's Assistant found that Richard had ½ centimeter laceration inside
13 his upper lip.

14
15 3.21 Appellant never attempted to conceal the events that occurred at the 7-Eleven. Our viewing of
16 the video tape from the 7-Eleven store shows that Appellant remained calm and attempted to maintain
17 control of the situation. Neither client was injured as a result of Appellant's actions toward them and
18 Appellant prevented them from causing further harm to each other. If Appellant had engaged in the type
19 of behavior described by the store owner and clerks, the clients would have sustained bruising or other
20 injuries.

21
22 3.22 On August 21, 1997, a Personnel Conduct Report was initiated alleging that Appellant had left
23 Richard and Gordon alone in the car while he went into the 7-Eleven store.

1 3.23 Pursuant to DSHS policy, the incident was referred to the Washington State Patrol (WSP) for
2 investigation. The WSP investigation is dated October 21, 1997. The case was sent to the Pierce
3 County Prosecutor's Office for review. No charges were filed against Appellant.

4
5 3.24 The WSP report was received in the DSHS personnel office on February 24, 1998 and was
6 forwarded to Renetta Marlow. On March 5, 1998, a second PCR was initiated. The second PRC
7 alleged that Appellant had abused both clients.

8
9 3.25 Prior to August 13, 1997, an incident had occurred during which Appellant left Richard and
10 Gordon alone. In that incident, it was determined that Appellant was following a directive of his
11 supervisor and no disciplinary action was taken against Appellant. (Testimony of Linda Rolfe).

12
13 3.26 Linda Rolfe, Regional Administrator for Region 5 Division of Developmental Disabilities, was
14 Appellant's appointing authority. After completion of the PCR process, Ms. Rolfe determined that
15 misconduct had occurred. Ms. Rolfe felt that Appellant had made a series of poor decisions, that his
16 decisions put the clients and community at risk and she was concerned that Appellant did not believe
17 that he had done anything wrong. Ms. Rolfe reviewed Appellant's work history and concluded that with
18 his experience, he should have known the proper way to deal with the clients. Ms. Rolfe determined
19 that Appellant neglected his duty; failed to ensure the safety of the clients and the community; failed to
20 comply with agency policies on abuse, support, restrictive procedures and misuse of authority and force;
21 and that his actions rose to the level of gross misconduct. Ms. Rolfe considered less severe forms of
22 discipline, but because she did not believe that Appellant understood the seriousness of the situation, she
23 concluded that termination was appropriate.

24
25 3.27 Prior to working for SOLA, Appellant worked at Rainier School where he received training in
26 the appropriate methods to use in restraining Rainier School clients. While Appellant was aware of the

1 SOLA policy addressing methods to use for blocking and redirecting the actions of SOLA clients, he
2 received no training regarding appropriate restraint methods. The methods Appellant used to guide
3 Richard and restrain him from causing further injury to Gordon were consistent with the training
4 Appellant received at Rainier School.

6 **IV. ARGUMENTS OF THE PARTIES**

7 4.1 Respondent argues that Richard and Gordon were very vulnerable, that Appellant had
8 experience working with Richard and Gordon and that Appellant was aware of the guidelines that were
9 in place for the supervision of Gordon. Respondent asserts that the owner of the 7-Eleven and one of
10 the clerks were experienced in working with developmentally disabled adults and that they were
11 credible in their reports of Appellant's abusive handling of the clients. Respondent contends that
12 Appellant made choices that compromised the safety of the clients and the community, left the clients
13 alone in the car, failed to return the clients home by the most direct route, did not have the clients within
14 eyesight when he was in the 7-Eleven, and failed to properly manage the clients. Respondent asserts
15 that Appellant's bad judgment further aggravated the situation.

16
17 4.2 Appellant argues that the testimony of the store owner and employees is not credible. Appellant
18 contends that he did not abuse the clients and that the clients had no injuries consistent with the reports
19 made by the store owner and employees. However, Appellant admits that in hindsight, he could have
20 done things differently. Appellant asserts that August 13th was a hot day and he offered to buy Richard
21 a soda in an effort to redirect him and help him cool down. Appellant contends that he followed the
22 training he received at Rainier School in an effort to guide and redirect Richard and to prevent further
23 harm to Gordon. Appellant further contends that he never attempted to hide who he was or what had
24 occurred and that he willingly provided information to the store owner, the detective, the paramedic and
25 Respondent. While Appellant was aware of the policy that prohibited leaving the clients alone,

Appellant argues that in the real world, policies can be hard to live by and that under the circumstances presented here, dismissal is too severe.

4.3 Appellant further argues that Respondent failed to follow the timelines in the PCR policy. Appellant asserts that the investigative process used by the WSP was too lengthy and that the report was not submitted to DSHS in a timely manner. Therefore, Appellant contends that the second PCR was untimely and should be dismissed.

4.4 Respondent argues that the second PCR was issued in compliance with the policy and within the appropriate time frame following the agency's receipt of the WSP report.

V. CONCLUSIONS OF LAW

5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

5.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

1 5.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry
2 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

3
4 5.5 Willful violation of published employing agency or institution or Personnel Resources Board
5 rules or regulations is established by facts showing the existence and publication of the rules or
6 regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or
7 regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health
8 Services, PAB No. D93-053 (1994).

9
10 5.6 Respondent has failed to prove that Appellant's actions on August 13, 1997 constituted
11 misconduct or that he physically assaulted or abused the clients.

12
13 5.7 Furthermore, Respondent has failed to prove that Appellant's actions were contrary to written
14 rules or regulations. Appellant appropriately utilized the skills and techniques he was taught by DSHS
15 for managing clients at Rainier School. Unless Respondent provides specific training to the contrary, it
16 is reasonable for Appellant to rely on the training he received while he was employed by Respondent at
17 Rainier School. In addition, although Appellant did not strictly adhere to the guideline for Gordon, the
18 testimony of Linda Rolfe herself established that the guideline was not consistently enforced. Under the
19 totality of the circumstances, Appellant did not willfully violate the guideline.

20
21 5.8 Respondent has failed meet its burden of proof that Appellant neglected his duty, committed
22 gross misconduct or willfully violation of published employing agency rules or regulations and the
23 appeal should be granted. Because we have concluded that Respondent failed to meet its burden of
24 proof, it is unnecessary for us to determine whether Respondent complied with the PCR policy.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Darryl Horton is granted

DATED this _____ day of _____, 1999.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Walter T. Hubbard, Chair

Nathan S. Ford Jr., Vice Chair

Gerald L. Morgen, Member